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Public Prosecutor v Daniel Ionel Turcan

B HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45A-126–11 OF 2014
ZULKIFLI BAKAR J
19 DECEMBER 2016

C *Criminal Procedure — Dangerous drugs — Trafficking — Offence of dangerous drugs in transit — Dangerous Drugs Act 1952 s 21(6) — Whether circumstances of case led to inference of custody, control and knowledge by accused — Whether statutory presumption against accused rebutted*

D *Evidence — Burden of proof — Accused gave defence from witness box — Consistent with cautioned statement made to police earlier — Whether police failed to investigate material particulars given by accused in his cautioned statement — Whether failure left material gap in prosecution's case*

E The accused was charged in Shah Alam High Court for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') which attracts the death penalty under s 39B(2) of the said Act. The facts were that on 13 January 2014, a team of police officers conducting surveillance in KLIA saw the
F accused walking with a shoulder bag. A physical body search on the accused did not reveal any incriminating items. However, an inspection of the luggage belonging to the accused revealed two packages containing white powdery substance suspected to be dangerous drug in one the handbags kept inside the said luggage. The prosecution's case was that the accused had custody and
G control of a dangerous drug for the purpose of trafficking in Malaysia. Relying on the Act, the prosecution invoked the statutory presumption that the accused had knowledge of the possession and nature of the drug. During the course of the trial, the court considered submissions, amongst others, on: (a) dangerous drugs in transit; (b) statutory presumption of knowledge against the
H accused; (c) omissions in the prosecution's opening address; (d) shoddy investigations by the investigation officer; and (e) wilful blindness. At the end of the prosecution's case, the court found a prima facie case had been established against the accused. Accordingly, the accused was asked to enter his defence. In his defence, the accused claimed that he was on transit to Vietnam
I via Malaysia. He alleged that one 'Jamal', who he met in Sao Paolo early 2013, had asked him to present the handbags as a gift to Jamal's family in Laos. 'Jamal' had also provided the accused with two handphones to keep in touch and USD300 to sustain through the transit. Further, 'Jamal' arranged for the accused to meet with one 'Jorge' once in Laos. The accused gave evidence under

oath, tendered his cautioned statements and called a Cyber Security analyst as a witness to give evidence with regard to the handphones. A

Held, acquitting and discharging the accused from the offence charged:

(1) It was unacceptable for the offence of drugs 'in-transit' be simply applied by the defence just by claiming that the accused intended to deliver the drug to another country through Malaysia. This would mean that Malaysia was a safe transit point and become a hub to convey illicit drugs from one country to another country through Malaysia. That was surely not the intention of the law under s 21(6) of the Act and for that matter could not be the purpose of having the Act in the first place (see para 18). B C

(2) The prosecution successfully invoked the statutory presumption under s 37(d) of the Act to presume the accused having knowledge for possession of the drugs. It was the accused who identified the luggage as his and he collected the bag which has the luggage tag under his name. All these were sufficient evidence to establish custody and control of the drugs (physical possession) with presumed knowledge to constitute mens rea possession under the law. Additionally, the manner of the drugs which were kept in the special compartment of the handbags oblivious to naked eyes would attract a reasonable inference that the accused knew about the drugs which were kept discretely inside the handbags to be carried in his luggage to avoid detection by the authorities (see para 19). D E

(3) The large quantity of the drug in question was sufficient to infer that they were transported solely for distribution purpose from one place to another and not for own personal consumption. The act amounted to trafficking either by way applicability of the presumption or by reasonable inference from the facts or the definition of trafficking in the Act (see para 20). F

(4) The court was not bound by the opening statement to find any verdict. There was nothing significant or bad faith or improper motive on the part of the prosecution in failing to mention the existence of another bag in the opening statement as it had no significance to the overall evidence (see paras 23–24). G

(5) It is trite law that the judge must consider the contents of the cautioned statement and compare it with the testimony by the accused in court. The court found that the cautioned statement (D52) was consistent with the oral testimony by the accused and that the names of 'Jamal and Jorge' were raised at the first available opportunity and not as an afterthought (see para 37). H I

(6) PW6 did not adequately investigate the material particulars given by the accused in his cautioned statement (D52) especially there were relevant numbers saved in the LG phone (P45), as analysed by SD2, which was in

contrary with the evidence by PW6 during the prosecution's case that there was no record found in the phone to enable PW6 to conduct further investigation. PW6 had clearly suppressed this evidence and misled the court. This piece of evidence was of significance to this case and hence had left a material gap in the prosecution's case wherein the accused had raised a reasonable doubt to the truth of the prosecution's case (see para 40).

(7) The accused had not been wilfully blinded and it was reasonable that he did not know about the special compartment inside the handbags which contained the drugs. The act of the accused inspecting the handbag had satisfied the court that he had made 'further inquiries' that was considered not to constitute 'wilful blindness'. The presumption was hence rebutted and the accused did not have actual knowledge about the existence of the drug in the circumstances (see para 44).

(8) When there was no mens rea possession of the prescribed drugs, there could not also be trafficking of the said drugs. The prosecution failed to prove its case beyond reasonable doubt against the accused having mens rea possession of the drugs inside the handbags found in the luggage bag. For the foregoing reasons, the court found that it was unsafe to convict the accused of the offence as charged (see paras 45–46).

[Bahasa Malaysia summary

Tertuduh telah dituduh di Mahkamah Tinggi Shah Alam kerana kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') yang membawa hukuman mati di bawah s 39B(2) Akta tersebut. Fakta kes adalah pada 13 Januari 2014, sepasukan polis yang melakukan pengawasan di KLIA melihat tertuduh berjalan dengan beg sandang. Carian badan secara fizikal ke atas tertuduh tidak menunjukkan apa-apa barangan yang dipertuduhkan. Walau bagaimanapun, pemeriksaan bagasi milik tertuduh menunjukkan terdapat dua bungkusan yang mengandungi bahan serbuk putih yang disyaki dadah berbahaya dalam salah satu beg tangan yang disimpan dalam bagasi tersebut. Kes pendakwaan adalah bahawa tertuduh mempunyai kawalan dan jagaan dadah berbahaya itu bagi tujuan pengedaran di Malaysia. Bergantung kepada Akta tersebut, pendakwaan telah menggunakan andaian statutori bahawa tertuduh mempunyai pengetahuan tentang milikan dan sifat dadah itu. Sepanjang perbiacaraan dijalankan, mahkamah telah mempertimbangkan hujah-hujah, antara lain, berhubung: (a) dadah berbahaya dalam transit; (b) andaian statutori tentang pengetahuan terhadap tertuduh; (c) peninggalan dalam pembuka kata pendakwaan; (d) siasatan tidak lengkap oleh pegawai siasatan; dan (e) sikap tidak endah yang disengajakan. Di akhir kes pendakwaan, mahkamah mendapati satu kes prima facie telah dibuktikan terhadap tertuduh. Oleh demikian, tertuduh telah diminta untuk memasukkan pembelaannya. Dalam pembelaannya, tertuduh mendakwa bahawa dia sedang dalam transit ke Vietnam melalui Malaysia. Dia

mengatakan bahawa seorang bernama 'Jamal', yang ditemuinya di Sao Paolo awal 2013, telah memintanya untuk memberikan beg-beg tangan tersebut sebagai hadiah kepada keluarga Jamal di Laos. 'Jamal' juga telah memberikan tertuduh dua telefon bombit untuk berhubung dan USD300 untuk bertahan sepanjang transit itu. Selanjutnya, 'Jamal' telah mengatur untuk tertuduh berjumpa dengan 'Jorge' apabila tiba di Laos. Tertuduh memberi keterangan bersumpah, menenderkan kenyataan beramarannya dan memanggil seorang ahli analisis Cyber Security untuk memberi keterangan berhubung telefon bimbit tersebut.

Diputuskan, membebas dan melepaskan tertuduh daripada kesalahan yang dituduh:

(1) Ia tidak boleh diterima untuk kesalahan dadah 'in-transit' digunapakai sewenang-wenangnya oleh pembelaan dengan hanya mendakwa bahawa tertuduh berniat untuk menghantar dadah itu ke negara lain melalui Malaysia. Ini bermaksud bahawa Malaysia adalah pusat transit yang selamat dan menjadi hub untuk menghantar dadah berbahaya dari satu negara ke negara lain melalui Malaysia. Ini pasti bukan niat undang-undang di bawah s 21(6) Akta tersebut dan perkara itu bukan tujuan Akta tersebut digubal (lihat perenggan 18).

(2) Pendakwaan berjaya menggunakan andaian statutori di bawah s 37(d) Akta tersebut untuk mengandaikan tertuduh mempunyai pengetahuan tentang milikan dadah itu. Ia adalah tertuduh yang mengenalpasti bagasi itu sebagai miliknya dan dia mengambil beg itu yang mempunyai tanda nama pada bagasi itu. Semua ini adalah keterangan yang mencukupi untuk membuktikan jagaan dan kawalan dadah (milikan fizikal) dengan andaian milikan untuk membentuk milikan mens rea di bawah undang-undang. Tambahan, cara dadah yang dimpan dalam bahagian khas beg tangan itu tersembunyi dari pandangan mata akan menarik inferens yang munasabah bahawa tertuduh mengetahui tentang dadah yang disimpan secara tersembunyi dalam beg-beg tangan yang dibawa dalam bagasinya untuk mengelak daripada dikesan oleh pihak berkuasa (lihat perenggan 19).

(3) Kuantiti besar dadah yang dipersoalkan itu adalah mencukupi untuk memberi inferens bahawa ia dihantar semata-mata untuk tujuan pengedaran dari satu tempat ke satu tempat lain dan bukan untuk kegunaan peribadi. Perbuatan itu merupakan pengedaran sama ada melalui pemakaian andaian atau melaui inferens munasabah berdasarkan fakta atau tafsiran pengedaran dalam Akta tersebut (lihat perenggan 20).

(4) Mahkamah tidak terikat dengan kenyataan pembuka untuk mendapati apa-apa keputusan. Tiada apa-apa yang signifikan atau berniat jahat atau motif yang tidak wajar di pihak pendakwaan di atas kegagalan untuk menyatakan kewujudan satu lagi beg dalam kenyataan pembuka kerana

ia tidak mempunyai signifikan kepada keterangan keseluruhan (lihat perenggan 23–24).

(5) Ia adalah undang-undang lapuk bahawa hakim perlu mempertimbangkan kandungan kenyataan beramaran dan membandingnya dengan keterangan oleh tertuduh di mahkamah. Mahkamah mendapati bahawa kenyataan beramaran (D52) adalah konsisten dengan keterangan lisan oleh tertuduh dan bahawa nama-nama 'Jamal and Jorge' telah ditimbulkan pada peluang pertama yang ada dan bukan suatu yang telah difikirkan kemudian (lihat perenggan 37).

(6) PW6 tidak menyiasat dengan sewajarnya butiran material yang diberikan oleh tertuduh dalam kenyataan beramarannya (D52) terutamanya nombor-nombor relevan yang disimpan dalam telefon LG (P45), sepertimana dianalisi oleh SD2, yang bertentangan dengana keterangan oleh PW6 sepanjang kes pendakwaan bahawa tiada rekod didapati dalam telefon itu bagi membolehkan PW6 melakukan siasatan lanjut. PW6 jelas telah menyembunyikan keterangan dan memesongkan mahkamah. Keterangan ini adalah penting kepada kes ini dan justeru meninggalkan lompang besar dalam kes pendakwaan di mana tertuduh telah menimbulkan keraguan munasabah terhadap kebenaran kes pendakwaan (lihat perenggan 40).

(7) Tertuduh bukan bersikap tidak endah dengan sengaja dan ia adalah munasabah bahawa dia tidak mengetahui tentang bahagian khas dalam beg-beg tangan yang mengandungi dadah tersebut. Perbuatan tertuduh memeriksa beg tangan itu meyakinkan mahkamah bahawa dia telah membuat 'further inquiries' yang dianggap tidak merupakan 'wilful blindness'. Andaian tersebut dengan itu telah dipatahkan dan tertuduh tidak mempunyai pengetahuan sebenar tentang kewujudan dadah dalam keadaan itu (lihat perenggan 44).

(8) Di mana tiada milikan mens rea ke atas dadah yang ditetapkan, maka tidak boleh dikatakan terdapat pengedaran dadah tersebut. Pendakwaan telah gagal membuktikan kesnya melampaui keraguan munasabah terhadap tertuduh mempunyai milikan mens rea ke atas dadah dalam beg tangan yang dijumpai dalam bagasi itu. Berdasarkan sebab-sebab itu, mahkamah mendapati ia tidak selamat untuk mensabitkan tertuduh atas kesalahan seperti yang dituduh (lihat perenggan 45–46).]

Notes

For cases on burden of proof, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 670–1054.

For cases on trafficking, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2178–2187.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chan Kim Seng v PP [2016] 3 MLJ 80, CA (refd)
Chan King Yu v PP [2009] 1 MLJ 457; [2009] 1 CLJ 601, FC (refd)
Ediawe Eshilama Clinton v Pendakwa Raya [2015] MLJU 362; [2015] 9 CLJ 169, CA (refd)
Isidro Leonardo Quito Cruz v PP [2013] 2 MLJ 1; [2013] 2 CLJ 1025, FC (folld)
Koh Tiong Hock v PP [2011] 4 MLJ 40; [2011] 2 CLJ 377, CA (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Mat v PP [1963] 1 MLJ 263; [1963] 1 LNS 82 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 1 CLJ Rep 311, SC (refd)
Najmudeen Abdul Kader lwn Pendakwa Raya [2013] 4 MLJ 18, CA (refd)
Nenggani Asmo v PP [2014] 1 MLJ 501, CA (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64, PC (refd)
Ong Lock Soon v PP [2012] 2 MLJ 641, CA (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193, FC (refd)
PP v Herlina Purnama Sari [2016] 2 MLJ 724, CA (refd)
PP v Iskandar bin Mohamad Yusof [2006] 5 MLJ 559, HC (refd)
PP v Jorge Enrique Pellon Tellon [1998] 4 MLJ 183; [1998] 4 CLJ 278, CA (refd)
PP v Sa'ari bin Jusoh [2007] 2 MLJ 409, FC (refd)
Tan Kiam Peng v PP [2008] 1 SLR 1, CA (refd)
Teh Hock Leong v PP [2010] 1 MLJ 741, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 21(1), (6), 37(d), 37(da)(ix), 39B, First Schedule

Mariam bt Omar (Rozana bt Husin with her) (Deputy Public Prosecutor, Selangor State Legal Advisor's Office) for the prosecution.
N Sivananthan (Jay Moy with him) (Sivananthan) for the defendant.

Zulkifli Bakar J:

INTRODUCTION

[1] The accused was charged in the High Court of Shah Alam for drug trafficking. The charge (P2) against the accused read as follows:

> That you on 13th January 2014, at about 4.30pm, at the Departure Gate C14, Bangunan Satelite Perlepasan dan Ketibaan Antarabangsa, KLIA, Sepang, in the district of Sepang, in the state of Selangor, did traffic in a dangerous drug, to wit, 1599.8 gram Cocaine and thereby committed an offence under section 39B(1)(a)

of the Dangerous Drugs Act 1952 and punishable under section 39B(2) of the Dangerous Drugs Act 1952.

THE CASE FOR THE PROSECUTION

[2] On 13 January 2014, at around 4pm, Insp Mohd Zaidi ('PW4') led his team members from Narcotics Crime Investigation Department, Bukit Aman and assisted by police force of NCID, KLIA consisted of ASP Mohideen ('PW5') to conduct surveillance at lobby in front of transfer counter, at Bangunan Satelite Perlepasan & Ketibaan Antarabangsa, KLIA, Sepang for about half an hour.

[3] From the distance of 15 meter, PW4 and his raiding team saw the accused was walking from the direction of transfer counter and carrying a shoulder bag ('D50'). PW4 then went to introduce himself to the accused and asked for the passport (P23), booking ticket (P20 and P21) and baggage claim card (P22) from the accused. A physical body search was carried out on the accused and there was no incriminating item being found.

[4] PW4 asked PW5 to request for permission to obtain the luggage of the accused. PW5 contacted the KLASS office (Kuala Lumpur Airport Service) which managed the flight of Emirates 408 in respect of luggages and relevant flight matters in KLIA. After 15 minutes, PW5 was contacted by the official at the KLASS office and permitted to bring the accused to enter the lower part of Gate C14 (site of bag transfer) escorted by auxilary police ('polis bantuan') of KLIA for the purpose requested.

[5] At the lower part of Gate C14, PW4 instructed the accused to collect his own luggage (P39), in the presence of PW5. The bag collected was a black luggage bag (P39) wrapped with green-coloured plastic (P37). PW4 subsequently ordered the accused to bring the luggage to upper site of Gate C14.

[6] PW4 asked the accused to place the bag on a table for inspection. PW4 opened the green-coloured plastic and found the bag was locked with combination lock (P38) which could be opened with number '000'.

[7] PW4 further asked the accused to open the zip and top part of the bag. In the presence of the accused, PW4 inspected the bag and found that there were few handbags with different colours (P30–P35) and 15 shirts (P41(1–15)), three pairs of mens shoes (P42(1–3)), one pair of ladies shoes (P43) and three denim trousers (P40(1–3)) inside the bag (P39).

[8] PW4 took one of the handbags and felt it was unusually heavy. Hence,

PW4 suspected that there was item hidden in the special compartment of the said handbag and used a knife to cut open the front part of the handbag and found two packages wrapped with brown sellotape.

[9] PW4 later used the knife to cut open the package, as witnessed by the accused and the raiding team officers, found to contain white powdery substance suspected to be dangerous drugs (P36).

[10] The evidences stated above were supported by the evidence of PW5 who was together with PW4 at the time of arrest of the accused.

THE DRUGS

[11] According to the chemist, Pn Norhaya bt Jaafar ('PW3'), she received exhibits in a box from Insp Amrin bin Mohamad Arfi ('PW6') on 16 January 2014 at 2.49pm requesting to examine the contents of six handbags (P30–P35). Inside each handbag, she found white powdery substance and upon analysis, the powdery substance was confirmed to be cocaine weighing 1,599.8g as stated in the charge against the accused. The powdery substance was confirmed to be dangerous drug as defined under s 2 of the Dangerous Drugs Act 1952 ('the DDA 1952') in the First Schedule. A chemist report (P18) was prepared by PW3. On 23 May 2014 at 11.40am, PW3 returned the exhibits to PW6 together with P18. In the course of this trial, the identity and weight of the drugs were never disputed by the defence.

FINDINGS AT THE END OF THE PROSECUTION'S CASE

[12] There are four issues advanced by the defence in the trial as follows:

(1) drug in transit;

(2) no knowledge of the drugs on the part of the accused;

(3) exh D50 (bag) which was not seized and marked; and

(4) shoddy investigations by investigating officer ('PW16').

Issue (1): Drugs in transit

[13] The accused was on flight from Dubai to Hanoi, Vietnam via Malaysia. The counsel for the accused at this stage argued that the accused did not intend to enter Malaysia as he did not go to the immigration counter on his own accord but taken by the police there. The counsel contended that the stamp in his passport was done and he was on his way to get his boarding pass to board the next flight to Hanoi. In this context, the counsel argued at most the accused could be only charged with s 21(6) of the DDA 1952, instead of s 39B of the

DDA 1952.

[14] The counsel for defence cited the Court of Appeal case of *Public Prosecutor v Jorge Enrique Pellon Tellon* [1998] 4 MLJ 183; [1998] 4 CLJ 278 and argued that the accused was merely 'in transit' that he was carrying the drugs to another country and not Malaysia and therefore Malaysia will not be a place where the drugs would be distributed. In the circumstances, the populace at Malaysia will not suffer the negative effect as the drugs are not distributed in this country. The counsel for the accused asked for lesser penalty under the said s 21(6) of the DDA 1952:

(a) the counsel further distinguished the case of *Ong Lock Soon v Public Prosecutor* [2012] 2 MLJ 641 (CA), that the accused in *Ong*'s case was in the process of exporting the drug from Malaysia to the final destination being Sydney, Australia while the accused in the present case, like *Pellon* had merely brought the drug through Malaysia;

(b) the counsel also distinguished the case relied by the prosecution, ie Federal Court in *Isidro Leonardo Quito Cruz v Public Prosecutor* [2013] 2 MLJ 1; [2013] 2 CLJ 1025 that the accused had passed through the immigration checkpoint counter and the immigration officer on duty stamped the accused's passport to grant him a social pass which allowed the accused to stay in Malaysia for 90 days. However, in the present case, the counsel submitted that the accused did not intend to enter Malaysia since he did not go through the immigration counter to get his passport stamped; and

(c) the counsel for the defence pointed to this court that the Federal Court in *Quito Cruz* agreed with the decision in *Ong Lock Soon* and thereby contended that the facts of *Pellon*'s case has almost identical facts with the present case, compared to *Ong Lock Soon* which had material difference in facts. Therefore, the counsel contended that this court is bound by the *Pellon*'s case which had recognised the applicability of principle of 'in transit' under s 21(6) of the DDA 1952, which is a different and lesser than drug trafficking offence.

[15] In my view, the counsel for defence is not justified to advance the argument of drug 'in transit' and ask for a lesser offence against the accused (which, if convicted, the punishment prescribed is a fine not exceeding twenty thousand ringgit or to imprisonment for a term of not exceeding five years or to both) in this case. In the course of this trial, the stance and argument of the defence all along was that there was no knowledge on the part of the accused as to the existence of the impugned drug in the handbags. On the other hand, by the contention of drug in transit, the counsel seemed to indicate to this court that the accused had knowledge about the drug in his possession but the accused had in fact intended to bring the drug to another country, but not

Malaysia. There is a situation and a stance of blowing hot and cold on the part of the defence herein. Be that as it may, in the circumstances, this court will address this first issue together with the second issue *(issue (2))* as both are actually intertwined.

Issue (2): No knowledge of the drugs on the part of the accused (correlated with issue (1)) and trafficking of the said drugs

[16] I noted the contention of the counsel that the accused did not have prior knowledge of the drug in question because of the accused's docile conduct as there was no overt act of the accused at the time of arrest, and also the accused had cooperated well with the enforcement officers:

(a) however, this contention is of no significance because everyone is aware of the security measure at the airport is tight and chance of successful escape is practically zero. This situation had been emunerated in the Federal Court case of *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741:

> [5] It is our view that in order to draw a favourable inference from the appellant's contemporaneous conduct, his action or inaction must be examined in the light of the situation at the material time. *The area where the appellant was confronted by PW5 was the arrival gate of an incoming flight in the KLIA. This was the only exit point where passengers disembarking the plane can enter the KLIA terminal. It is common knowledge that the area was tight and restricted with hardly any room for the appellant to make a successful escape even if he had tried.* From here the appellant was then taken by PW5 and his men to PW5's office in the KLIA. The approximate walking distance was 600–800 metres. Here again the appellant's chances of a quick getaway were minimal since he was escorted and was within the restricted vicinity of the KLIA building. And, if the appellant were to attempt to throw away or disassociate himself with the backpack during this entire duration described it would evidently be noticeable. *Of course, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion. So against these circumstances, the appellant's docile conduct throughout the period described could not have inferred an absence of knowledge of the said drugs*. For this reason there is no misdirection by the courts below. (Emphasis added.) (Also refer to the case of *Pendakwa Raya lwn Jiang Haiyan (W/China)* [2016] 9 MLJ 133).

[17] Turning back to the issue of drug 'in transit', I would reproduce herein the definition of the term 'in transit' as stated in the s 2 of the DDA 1952 for ease of reference:

> *'in transit' means taken or sent from any country and brought into Malaysia by land, air or water (whether or not landed or transhipped in Malaysia) for the sole purpose of being carried to another country either by the same or another conveyance*. (Emphasis added.)

(a) it is noteworthy to read the above provision together with s 21(1) of the

DDA 1952 which stated:

> (1) No person shall bring any dangerous drug to Malaysia in transit unless —
>
> (i) the drug is in course of transit from a country from which it may lawfully be exported, to another country into which such drug may *lawfully be imported*; and
>
> (ii) except where the drug comes from a country not a party to the Convention, it is accompanied by *a valid and subsisting export authorization or diversion certificate*, as the case may be. (Emphasis added.);

(b) in this regard, it is my judgment, the purpose of drugs transported is the essential consideration, that is, it had to be lawful but abused then only it can fall under the category for an offence under s 21(6) of the DDA 1952. I found that it will be 'in transit offence' when the drugs in question which was carried for legitimate purpose such as for medical or scientific use was abused or diverted for different purpose. I found support from the case of *Quito Cruz* which held:

> [19] We agree with the Court of Appeal in the instant appeal which adopted the reasoning of the decision in Ong Lock Soon that *Part V of the DDA is specifically intended for the purpose of governing the importation and exportation of dangerous drugs for legitimate purposes as provided under the Single Convention of Narcotic Drugs 1961. Reference to the Hansard was made by the court in Ong Lock Soon in analysing the intent of Part V, particularly to the speech of the Minister of Health who presented the Bill in Parliament. The Single Convention 1961 is an international convention whose aim, inter alia is to 'restrict the use of narcotic drugs to medical and scientific purposes and to prevent their diversion and abuse, while at the same time ensuring their availability for legitimate purposes*. Part V of the DDA was thus introduced to regulate and control the entry and exit of such dangerous drugs for legitimate purposes. (Emphasis added.)

[18] In the instant case, it is not the case for the prosecution to suggest any legitimate purpose for the accused to bring the drugs in question to suit for drugs 'in transit' offence to be charged against the accused. Therefore, the act of the accused in transporting the drugs which is not connected for legitimate purpose, fell squarely for a charge of trafficking under s 39B of the DDA 1952 once the accused is on Malaysian soil:

(a) by operation of the *DDA 1952*, this court found, it is unacceptable for the offence of drugs 'in-transit' is simply applied by the defence without restriction in merely claiming that the accused intends to deliver the drug to another country through Malaysia. This would mean that Malaysia is a safe transit point and become a hub for the whole world of drug traffickers to convey illicit drugs from one country to another country

through Malaysia. That is surely not the intention of the law under s 21(6) of the DDA 1952 and for that matter could not be the purpose of having *DDA 1952* in the first place.

[19] On the other hand, this court found the accused had custody and control of the impugned drug in the handbags inside the luggage (P39) he carried and checked in for his flights. This is by way of evidence of custody and control equal to physical possession (*Public Prosecutor v Herlina Purnama Sari* [2016] 2 MLJ 724). To establish mens rea possession, the prosecution still has to prove that the accused has knowledge about the existence of the said drugs and:

(a) from the evidence adduced, this court found the prosecution had successfully invoked the statutory presumption under s 37(d) of the DDA 1952 to presume the accused having knowledge for possession of the drugs. It was the accused who identified the luggage as his and he collected the bag which has the luggage tag under his name. All these are sufficient evidences to establish custody and control of the drugs (physical possession) with presumed knowledge to constitute mens rea possession under the law;

(b) relying on the case of *Ediawe Eshilama Clinton v Pendakwa Raya* [2015] MLJU 362; [2015] 9 CLJ 169, wherein the Court of Appeal held as follows:

> [23] ... On the facts of this case we agree with the learned trial judge that *there was sufficient evidence to establish possession when the appellant was caught with the bag containing drugs. He was seen carrying the bag with him. The luggage tag P29A of the bag P29 was under his name. All these facts would in our view be sufficient to attract the presumption of possession and knowledge under s 37(d)* (see *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337, *Tan Ah Tee & Anor v Public Prosecutor* [1980] 1 MLJ 49; [1978] 1 LNS 193). On the facts also, the evidence was overwhelming that the appellant was carrying the bag containing drugs which constitute the act of trafficking unders 2 of the Act. The failure of the learned judge to state clearly in his judgment under which overt act is not fatal on the facts of the present case. (Emphasis added.); and

(c) this rebuttable presumption presupposes the accused to have mens rea possession of the drug in question as he was caught with custody and control of the luggage containing the drugs. Additionally, the manner of the drugs which were kept in the special compartment of the handbags oblivious to naked eyes would attract a reasonable inference that the accused knew about the drugs which were kept discretely inside the handbags to be carried in his luggage to avoid detection by the authorities (*Herlina Purnama Sari*).

A ACT OF TRAFFICKING

[20] After establishing the accused has mens rea possession of the impugned drug, the prosecution relied on s 2 of the DDA 1952 that the accused was trafficking the said drugs at that material time. It is established that, the accused B carried a total of 1,599.8g of cocaine which exceeded the prescribed minimum weight of 40g under s 37(da)(ix) of the DDA 1952. This court is satisfied that the large quantity of the drug in question is sufficient to infer that they were transported solely for distribution purpose from one place to another and not for own personal consumption (*Ong Ah Chuan v Public Prosecutor* [1981] 1 C MLJ 64). This act amounted to trafficking either by way applicability of the abovesaid presumption or by reasonable inference from the facts from definition of trafficking in the Act:

(a) in the Federal Court case of *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193, it was decided that: D

> [22]In the present case, the drug was carried in small plastic packets each containing small quantity of the drug. According to the evidence, 39.77g of heroin was found in a number of small plastic packets tucked in his waist, while 50 small plastic packets containing 9.09g of heroin was found in the E right side pocket and another 30 small plastic packets containing 5.57g of heroin was found in the left side pocket of the track top he was wearing. 20 small plastic packets were found in each of the right and left pockets of his trousers, containing a total of 7.66g of heroin. *Judging from the manner the drug was being carried, ie in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may drawn is that* F *the respondent was in fact carrying it for the purpose of trafficking. And bearing in mind the large quantity of the drug involved, it cannot be seriously contended that the drug was for his own consumption* ... (Emphasis added.);

(b) accordingly, in the case of *Koh Tiong Hock v Public Prosecutor* [2011] 4 G MLJ 40; [2011] 2 CLJ 377, Court of Appeal said:

> [19] Be that as it may, whether the proscribed drug was intended for distribution outside the country is totally irrelevant to the offence of trafficking under the DDA. *The inclusion of the word 'exporting' as an act of trafficking in the definition of 'trafficking' in s 2 clearly puts distribution abroad* H *within the contemplation of the law. Secondly, the gravamen of the charge is not the act of distributing the drug but the act of transporting the proscribed drug for the purpose of distribution, irrespective of whether the purpose is achieved and irrespective of whether the intended distribution is within the country or abroad.* As submitted by the learned deputy the intention of the DDA is to I encompass both drugs brought into and out of the country. The reference to the purpose for which the drug is being transported was made by the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64; [1980] 1 LNS 181 solely to draw a distinction between the offence of mere possession and that of trafficking as the law provides a far heavier punishment for the latter. *As stated in the Singapore case of Lau Chi Sing v Public Prosecutor* [1989]

1 MLJ 5; [1988] 1 LNS 187, *the offence is completed once there is the act of transportation so long as its purpose is to transfer possession for some other person in contradistinction to an intention to keep the drug solely for one's own consumption.* Whether the transporter achieves his purpose is irrelevant to his guilt of the offence of trafficking. (Emphasis added.);

(c) pursuant to the above, the prosecution had established the elements of control, custody and knowledge of the existence of the drugs and transported it into Malaysian soil. The act of the accused in this case is trafficking the said drugs and it has nothing to do with the primary purpose of scientific or medicine for public good. The accused had therefore prima facie committed an offence under s 39B of the DDA 1952 and not an offence under s 21(6) of the Act.

Issue (3): Exhibit D50 (bag) which was not seized and marked

[21] PW4 testified that he saw the accused was carrying one bag (D50) at the time he stopped the accused at the front part of the transfer counter. This was supported by PW5 who sighted the accused had brought the said bag. PW4 subsequently inspected D50 and found no incriminating items inside the bag.

[22] The defence highlighted to the court that D50 was not recorded in both police report and search list since PW4 did not seize the bag. The defence said this was an obvious mistake made by PW4 since he failed to seize and mark the bag and its contents. Further, it was odd for the investigating officer ('PW6') who had knowledge of the existence of the bag but did not take any effort to remedy such mistake. Hence, the defence claimed that the accused was prejudiced due to non-seizable of the bag (D50), and nowhere stated about the bag in the opening speech (P48) by the prosecution.

[23] Based on the evidence before this court, the contention on this issue is without merit and a mere red herrings because:

(a) firstly, focus should be drawn to the handbags (P30–P35) which contained the impugned drug and not to the bag (D50) which has no drug found inside. D50 is never a subject matter in the criminal charge against the accused at this trial. There was no issue in so far concerned with D50 and hence it was immaterial whether it was seized and marked or otherwise. Bearing in mind the subject matter in this trial is the luggage bag (P39) which contained the handbags (P30–P35) which in turn contained the drug as stated in the charge;

(b) the investigating officer ('PW6') gave explanation about D50 which was not recorded in the handing over list because it was not listed in the seize list at the first instance and PW6 was also informed by PW4 that there was no suspicious and incriminating items inside D50; and

(c) during trial, D50 was brought and tendered in this court by the defence. Inside D50, there were personal belongings of the accused. The counsel for the defence was given the opportunity to cross-examine the prosecution's witness relating to this exhibit and this court found there was nothing significant or bad faith or improper motive on the part of the prosecution in omitting this bag. Supressing the existence of bag (D50) from the court's knowledge, it had, but it is of no significance to the overall evidence of the prosecution.

[24] Not only that, the defence stated that there was omission in the opening statement (P48) which showed the accused only brought one luggage bag (P39) which is fatal to the prosecution's case as it left out the existence of the bag (D50) that was also carried by the accused at that material time. The court do not agree with such proposition of the defence and such omission in the opening statement would not cause any prejudicial effect against the accused as this court is not bound by the opening statement to find any verdict. I echoed the statements in the judgment of Augustine Paul FCJ (as he then was) in the case of *Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 MLJ 409:

> [25] It follows that *a verdict can be founded on a basis not indicated by the prosecution in its opening address.* But it must be done in such a way so as not to place the accused at a tactical disadvantage with resultant unfairness to him ... (Emphasis added.)

Issue (4): Shoddy investigation by investigating officer ('PW16')

[25] The defence alleged that the investigating officer ('PW6') had failed to conduct his duty diligently since he admitted he had lost one simcard from the phone (P46).

[26] This court has taken note that PW6 who initially gave the reason of such missing was he had possibly dropped the simcard of P46 before he brought it to the court (without specifying to the court for which occasion). From the exh P14, it indicated that PW6 received two handphones and two simcards including of the said P46 on 13 January 2014 but then PW6 on 15 January 2014 handed the two handphones and one simcard excluding simcard of P46 to one Insp Cheang. It was inferred that the simcard was missing during that period, ie between 13–15 January 2014, whilst this case had started being mentioned in High Court on 14 January 2015.

[27] Further, the defence contended that PW6 had clearly conducted a shoddy and sloppy investigation since he gave both phones P45 and P46 to Insp Cheang who was from the intelligence unit instead of expert in the field of phone analysis.

[28] At this juncture, this court found that the aforemention is just a

technical issue which did not prejudice the accused since there was nothing to show that PW6 who sent the phones exhibit to Insp Cheang had any wrong motive and by his notion he was doing that as part of what he was supposed to do. When he testified in this court, he confidently said that he had carried out his investigation meticulously in this aspect. This court also found:

(a) it was immaterial and incapable of damaging the prosecution's case because PW6 had actually performed his task by collecting the phones exhibits and sent it to intelligence unit for analysis although the latter may not be the authority for analysis to be referred to, but it is still not wrong for the purpose of follow up investigations by that unit;

(b) nevertheless, this move did not cause the gap in the prosecution's case as can be seen where PW6 informed the result of analysis by Insp Cheang that the phone has no phone record. During re-examination, PW6 said:

Q: Berkenaan dengan telefon bimbit yang dirampas, semasa disoal balas kamu ada menyatakan bahawa kamu ada hantar handphone kepada Inspektor Cheang, untuk apa kamu hantar ini?

A: Untuk analisis sekiranya wujudnya nombor telefon yang boleh dikaitkan dengan kes siasatan saya.

Q: Jadi apa keputusan?

A: Saya dimaklumkan secara lisan, tidak wujud nombor telefon yang boleh dikaitkan, dan saya telah mengarahkan Inspektor Cheang memulangkan telefon tersebut dan saya tidak meminta sebarang ...

YA: Tak wujud nombor telefon yang boleh dikaitkan maknanya wujudlah nombor telefon. Nombor-nombor telefon lain wujudlah?

A: Tiada rekod.

YA: Tak wujud nombor telefon yang boleh dikaitkan dan tak wujud nombor telefon langsung berbeza tu.

A: Tidak wujud sebarang rekod nombor telefon.

YA: Tidak wujud langsung apa-apa nombor telefon dalam rekod telefon-telefon itu?

A: Ya.

(c) PW6 is a public officer who do not have any interest on the arrest and conviction of the accused and moreover he was confident that he had carried a thorough investigation. In the case of *Najmudeen Abdul Kader lwn Pendakwa Raya* [2013] 4 MLJ 18, I quote the relevant passage:

A [37] *Tambahan pula, SP5 ialah seorang penjawat awam yang tidak mempunyai apa-apa motif untuk menganiaya perayu dan hanya memberi keterangan mengenai apa yang sebenarnya berlaku (lihat kes Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257, *Public Prosecutor v Abd Latif bin Sakimin* [2005] 6 MLJ 351 *dan Pendakwa Raya lwn Aedy bin Osman* [2009] MLJU 39; [2009] 1 LNS 13) (Emphasis added.) (Also refer to the case of *Shahrin bin Ahmad Suffian lwn Pendakwa Raya* [2015] MLJU 363); and

B

(d) this court had at this stage evaluated the evidence of the investigating officer ('PW6') who did not even know the accused and by observing PW6's demeanour in testifying did not see any reason for him to frame the accused (*Chan Kim Seng v Public Prosecutor* [2016] 3 MLJ 80).

C

PRIMA FACIE CASE

D **[29]** Having evaluated the above evidences tendered by the prosecution on maximum evaluation at the close of the case for the prosecution and considered the issues raised as discussed above, this court found the prosecution had established a prima facie case against the accused (*Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 and *Balachandran v* E *Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85). This court called the accused to enter his defence on the charge preferred against him.

[30] Point to note, the defence had made an application to the court to send the handphone exhibits, ie P45 and P46 for analysis by Cyber Security and it F was allowed by this court as in my view the said exhibits are better to be sent to the analyst in the relevant field for analysis and for just decision of this case.

[31] The accused, after consulting his counsel, elected to give evidence under oath in his defence and also asked to call the analyst of the handphone as G its witness. The accused then testified as SD1, tendered his cautioned statements (D52) and called the analyst of the handphone as SD2.

THE CASE FOR THE DEFENCE

H

[32] In essence, the accused stated his defence as follows:

(a) in 1999, the accused left Romania where he was involved in the textile industry to go to Turkey. The accused moved to Italy in 2004 and worked in a fine arts restaurant. It was later in year 2009, the accused decided to I settle down in Spain and worked as an electrician;

(b) the accused loved to travel and experience new things. Subsequently, the accused travelled alone to Sao Paolo, Brazil and reached there on 1 December 2013;

(c) the accused stayed at the San Raphael Hotel, Largo do Arouche for the first four nights and later moved to Casa Verde Hotel, Rua Salesópolis which was about a 40-minute walkaway because it was too expensive to stay in the San Raphael Hotel for his budget;

(d) the accused, after one week of staying in the Casa Verde Hotel, met a guest who introduced himself as 'Jamal'. They met each other at the lobby reception and then became acquainted. They often hang out at restaurants, bars and clubs. Jamal claimed himself to have lived in Brazil for seven years and he would introduce some places that he was familiar with to the accused;

(e) approximately on 20 or 21 December 2013, 'Jamal' had proposed to the accused to visit Laos where his family stayed. 'Jamal' told the accused that he had not met his family for seven years. The accused was interested in this proposal as he could take this chance to visit Laos, a place where he had never been;

(f) the accused gave his existing flight ticket (Sao Paolo – Dubai (transit) – Kuala Lumpur (transit) – Hanoi (transit) – Vientiane – Bangkok – Madrid) to 'Jamal' who wanted to pay the difference in the change of the flight ticket to the new route to Laos;

(g) according to the accused, he had spent for the expenses when he went out to clubs and restaurants with 'Jamal', and in return, 'Jamal' is paying for the accused for the difference of the flight ticket price and also hotel booking in La Ong Dao Hotel, Vientiane (P19) which costed USD160 for eight nights;

(h) on 11 January 2014 (the night the accused was to leave Sao Paolo), 'Jamal' came to the accused's hotel room and told the accused that the taxi was waiting dowmstairs to take the accused to the airport and offered to help the accused to pack his bag as the accused did not have much time. The accused accepted 'Jamal' offer and went to the washroom to prepare himself;

(i) when the accused came out from the washroom, he saw 'Jamal' was trying to close his luggage bag (P39). The accused felt suspicious about the act of 'Jamal' who pressed on the suitcase to close it, due to the unreasonably increasing size of the luggage. Therefore, the accused unzipped the luggage bag to check on its content where he saw six ladies handbags. 'Jamal' explained that these six handbags were gifts for his family in Laos;

(j) the accused opened one of the handbags but the content was empty. It wiped away the accused's suspicion. 'Jamal' also gave the accused amount of USD300 to sustain the accused through the transit and one LG phone

(P45) to the accused to keep in touch since the accused's Nokia phone (P46) did not have international roaming facility. The accused then left the hotel for Sao Paolo airport; and

(k) according to the accused, 'Jamal' also informed him about the arrangement made by 'Jamal' when he arrived at Laos, where the accused was asked to wait for 'Joge' to take him to the hotel and after one or two days the accused could go to visit 'Jamal's family' as planned.

FINDINGS AT THE END OF DEFENCE'S CASE

Phone records — evidence of analyst (SD2)

[33] On request of the defence, the court allowed the exhibits (P45 and P46) to be sent to Cyber Security for analysis. The defence thus called the Digital Forensic Senior Analyst, Mohd Shahrizuan ('SD2') to give evidence. SD2 had testified to correct the typographical error in which 'DF20160315(1)HP02 Findings' to be of 'HP01' while 'DF20160315(1)HP01 Findings' to be of 'HP02'. The defence, relying on SD2's findings, that referring to the device's information (D54) that the message received as shown at pp 5–6 indicated an Universal Time Coordinates (UTC) of '-2.00' in which Brazil is one of the countries that uses this sort of UTC format, submitted that the time setting in the phone P45 was highly possible to be the time in Sao Paolo and supported the defence's contention that the said phone was given by 'Jamal' who stayed in Brazil for seven years:

(a) the calls were made from LG phone (P45) after the accused was arrested at around 4pm where there were three calls from the number '004166928368409 saved as Jorge' at 4.26pm on 13 January 2014;

(b) SD2 stated that the time difference between Sao Paolo and Dubai was six hours while the time difference between Sao Paolo and Malaysia was ten hours. In accordance with the flight itinerary dated 8 January 2014 (P21), it showed the accused arrived at Dubai on 12 January 2014 at 2115 hours (local time) and Kuala Lumpur on 13 January 2014 at 1350 hours (local time). It proved the numbers were dialled from different countries while the time received in the phone at that material time was shown in the morning hours; and

(c) the above evidences totally destroyed the evidence given by the investigating officer ('PW6') who, at the prosecution's stage, informed the court that there was no phone record found in the handphones. This significant evidence had also destroyed the credibility of PW6 and there is a reason now to doubt his earlier evidence regarding the records in the handphones which I shall discuss later in this judgment.

Cautioned statement (D52)

[34] The prosecution submitted to the court that the character of 'Jamal' and another 'Jorge' were fictitious characters in the accused's imagination as the prosecution pointed to this court the following issues:

(a) the accused did not inform the police that 'Jorge' had contacted him;

(b) it was illogical that 'Jamal' who stayed in Brazil for seven years still lived in the hotel; and

(c) the accused did not further ask 'Jamal' the reason that he did not visit his family in Laos for seven years.

[35] However, the court accepted the defence rebuttal submission to the above-mentioned contentions as these were trivial facts which shall not be taken to prejudice the accused. Specific questions were never put to the accused by the prosecution on these points but the prosecution only asked the accused whether he agreed 'Jamal' had no financial problem to visit his family in Laos. Furthermore, there was no rule to impose for a resident of a country must stay in a house and cannot stay in a hotel and therefore it was not impossible for 'Jamal' to stay in a hotel even he had stayed in Brazil for seven years.

[36] More importantly, the defence had established that the accused had at the earliest opportunity informed the investigating officer ('PW6') with all the relevant and necessary information. The accused told PW6 that the numbers of 'Jamal and Jorge' were in the LG phone (P45). The accused also explained the inconsistency found at D52 where he said he didn't have 'George's (Jorge) contact number' to actually mean he didn't remember the phone number. In my view, since there were phone records in fact existed then PW6 should have conducted investigation to find out whether the characters claimed by the accused were real or merely fictitious.

[37] This court thus had considered the cautioned statement (D52) that supported in the accused's defence that the names of 'Jamal and Jorge' were raised at the first available opportunity and not an afterthought. It was the court's duty to examine the cautioned statement (D52) and found it was consistent with the oral testimony by the accused during this trial. It is trite law that the judge must consider the contents of the cautioned statement and compare with the testimony by the accused in court, as held in the Court of Appeal case of *Nenggani Asmo v Public Prosecutor* [2014] 1 MLJ 501:

> [22] In our view, the cautioned statement made by the appellant to the police, is not in itself evidence of the truth of the facts stated therein. *The cautioned statement must not be accepted at face value but has to be tested and evaluated by taking into account the entire evidence placed before the court. This brings into focus the question whether the appellant's cautioned statement was considered by the learned judge and whether in her*

judgment she addressed her mind to it. As a matter of general principle, it is a serious misdirection by way of non-direction, which would occasion a failure of justice and warrant appellate interference, if indeed the learned judge had failed to judicially consider at all the appellant's cautioned statement. In this regard, what is most important is whether or not in substance and effect the learned judge in her judgment had adequately considered and judicially appreciated the cautioned statement. A careful reading of the judgment reveals that the learned judge narrated the appellant's cautioned statement as can be seen at p 226 of the appeal record ('AR'). Then, as can be seen at pp 234–235 of the AR, she took exceptional care to consider and judicially appreciate the gist of the appellant's evidence in court and tested it with the cautioned statement. In the words of the learned judge:

> The above story also differs substantially from the version given by the accused in her cautioned statement recorded on 23 March 2009, six days after her arrest on 17 March 2009. In her statement the accused claims her visits abroad were on the instructions of Deta who had 'tawarkan kepada saya untuk bekerja keluar negara membeli pakaian-pakaian sutera'. There was no mention of purchasing items for her shop in Jogjakarta in her cautioned statement. (Emphasis added.)

Flawed investigation by the investigating officer (PW6)

[38] Pursuant to the above, it was obvious that PW6 had bolstered up in trying to champion the prosecution's case when he had flawed in his investigation where it is necessary to obtain the phone records and to probe further in his investigation about the characters told by the accused. This was a serious omission that had prejudiced the right of the accused (*Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631). Yet, PW6 was prepared to suppress evidence from this court regarding the records in the handphones and one of simcard (he claimed lost) in order to negate the existence of 'Jamal' and 'Jorge' when he knew their names were mentioned in the cautioned statements. PW6 must have known these facts because he is the investigating officer of this case. These are the central points for the defence of the accused.

[39] It was also held in the Federal Court case of *Chan King Yu v Public Prosecutor* [2009] 1 MLJ 457; [2009] 1 CLJ 601 that:

> [78] As regards the material particulars relating to the existence of Man Chai which had been disclosed by the appellant in his cautioned statement exh D29 which was made on the day after his arrest, *I am of the view that the police had all the time to check as to their veracity. The burden was on the prosecution to check whether the appellant's version of the facts as they appeared in the cautioned statement was true or false. The onus was upon the prosecution to disprove this important part of the appellant's version of facts. The appellant was under no duty to put to the investigation officer the aforesaid material particulars in view of their prior disclosure in the cautioned statement* (see the case of *Alcontara Ambross Anthony v Public Prosecutor*). (Emphasis added.)

[40] Without doubt, the court should not condone the flawed by PW6 that he had not done his effort adequately to investigate the material particulars given by the accused in his cautioned statement (D52) especially there were relevant numbers saved in the LG phone (P45), as analysed by SD2, which was in contrary with the evidence by PW6 during the prosecution's case that there was no record found in the phone to enable PW6 to conduct further investigation. PW6 had clearly suppressed this evidence and misled this court when he had flawed in the conduct of his investigations whilst this piece of evidence is of significance to this case and hence had left a material gap in the prosecution's case wherein the accused had raised a reasonable doubt to the truth of the prosecution's case.

Wilful blindness claimed by the prosecution

[41] The prosecution alleged that it was failure on the part of the accused to make further inquiries as to the identity of 'Jorge' from 'Jamal' and specifically to enquire about 'Jamal' in order to know him deeply. With this, the prosecution argued that the accused shutted his eyes deliberately to the obvious and followed the plan of 'Jamal' and hence it fell into the situation of 'wilful blindness'.

[42] This court do not agree with contention by the prosecution because there was evidence that the accused on seeing 'Jamal' using his legs to step on the luggage (P39) trying to close it had explained that such act had triggred the accused's suspicion as to why was the size of the luggage became bigger so sudden after he entered into the washroom for a short period. What the accused had done was that he opened back the luggage and found there were six handbags inside. He did not stop there. He subsequently opened one of the handbags and looked into the content of the handbag but found it was empty. The accused did not deliberately close his eyes to the obvious. He did check the handbags and they were new and empty.

[43] This court refers to the case of *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR 1 which propounded the doctrine of wilful blindness explicitly:

> [125] The second central principle is that suspicion islegally sufficient to ground a finding of wilful blindness provided the relevant factual matrix warrants such a finding andthe accused deliberately decides to turn a blind eye. However, that suspicion must, as Lord Scott perceptively points out in *Manifest Shipping* (see at above), 'be firmly grounded and targeted on specific facts'. Mere 'untargeted or speculative suspicion' is insufficient (see also *Hor* at p 73). A decision in this last-mentioned instance not to make further inquiries is, as the learned law lord correctly points out, tantamount to negligence, perhaps even gross negligence, and is as such insufficient to constitute a basis for a finding of wilful blindness. As Lord Scott aptly put it (see at above), *'[s]uspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and,*

> *at the other extreme, reflect a firm belief in the existence of the relevant facts'. It is important to note that the (unacceptable) negligence which the Judge referred to in the court below relates to the levelof suspicionrequired before a decision not to make further inquiries will be considered to constitute wilful blindness. It is equally if not more important to emphasise that the Judge was therefore not stating that suspicion per se would not be sufficient to ground a finding of wilful blindness. On the contrary, suspicion is a central as well as integral part of the entire doctrine of wilful blindness*. However, the caveat is that a low level of suspicion premised on a factual matrix that would not lead a person to make further inquiries would be insufficient to ground a finding of wilful blindness where the person concerned did not in fact make further inquiries. What is of vital significance, in our view, is the substance of the matter which (in turn) depends heavily upon the precise facts before the court. It is equally important to note that in order for wilful blindness to be established, the appropriate level of suspicion (as just discussed) is a necessary, but not sufficient, condition, inasmuch as that level of suspicion must then lead to a refusal to investigate further, thus resulting in 'blind eye knowledge' (see also the second quotation from the article by Wasik & Thompson at below). (Emphasis added.)

[44] After considering the evidences, this court held the accused had not been wilfully blinded and it is reasonable that he did not know about the special compartment inside the handbags which contained the drugs. The act of the accused inspecting the handbag had satisfied this court that he had made 'further inquiries' that was considered not to constitute 'wilful blindness'. The presumption is hence rebutted and the accused did not have actual knowledge about the existence of the drug in the circumstances.

[45] After exercising great cautious in the evaluation of the defence's evidence and re-evaluation of the prosecution's case, this court found the prosecution had failed to prove its case beyond reasonable doubt against the accused having mens rea possession of the drugs inside the handbags (P30–P35) found in the luggage bag (P39) (*Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 CLJ Rep 311; *Public Prosecutor v Iskandar bin Mohamad Yusof* [2006] 5 MLJ 559). When there was no mens rea possession of the prescribed drugs, there cannot also be trafficking of the said drugs.

DECISION

[46] For the foregoing reasons, this court found that it is unsafe to convict the accused of the offence as charged. In the case of *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82, it is pertinent to appreciate the relevant context wholeheartedly:

> (e) if you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt — Acquit. (Emphasis added.)

[47] This court stresses on judicial practice that it is better to acquit ten guilty persons rather than to convict one innocent man especially in a case that carries a mandatory death penalty upon conviction. Premise on all the reasons as stated above, this court accordingly found the accused not guily, acquitted and discharged the accused from the offence charged.

Accused acquitted and discharged from the offence charged.

Reported by Sivaguru Paramasivam